Supreme Court, U.S.
FILED
APR 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1806

In The

Supreme Court of the United States

October Term, 1987

ANTHONY MAIRONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Third Circuit was in conflict with an applicable decision of the United States Supreme Court where the United States Court of Appeals for the Third Circuit affirmed the trial court's denial of a specific instruction on character testimony which requested instruction was a correct preposition of law according to decisions of the United States Supreme Court.

OTHER PARTIES

Appellant Edward Spangler was a party in the action below.

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No.

In The

Supreme Court of the United States

October Term, 1987

ANTHONY MAIRONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your petitioner, Anthony Mairone, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 29, 1988.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit entered its opinion affirming the conviction of petitioner for

Extortion, Conspiracy to Commit Extortion and Aiding and Abetting the Crime of Extortion, 18 U.S.C. § 1951 (1982); 18 U.S.C. § 2 on January 29, 1988. On February 25, 1988, the Court of Appeals for the Third Circuit entered an order denying petition for rehearing. A copy of the January 29, 1988 opinion filed by the United States Court of Appeals for the Third Circuit is printed in the appendix, *infra* at 3a. A copy of the February 25, 1988 order denying the petition for rehearing is printed at page 1a.

The District Court for the Eastern District of Pennsylvania, after denying petitioner's motions for new trial and judgment of acquittal sentenced the petitioner on July 29, 1987 to a term of imprisonment of four years on count 2; four years on each count, 3 through 16, to run concurrent with the sentence on count 2; and a suspended sentence of imprisonment on count 1 with the petitioner to be placed on probation for three years following his release from prison. The District Court's memorandum and order of July 28, 1987 is printed at pages 10a-18a.

JURISDICTION

The judgment of the Court of Appeals affirming the conviction of the petitioner was entered on January 29, 1988. A copy of the opinion of the United States Court of Appeals for the Third Circuit is printed at page 3a. On February 25, 1988 an order was entered denying a petition for rehearing (1a). The jurisdiction of this Court is invoked uner Title 28, United States Code, § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

Petitioner Anthony Mairone, a retired Philadelphia Police Officer, was tried before the Honorable Raymond J. Broderick sitting with a jury. This trial commenced on June 2, 1987. The case dealt with a period of time between July of 1980 and May of 1983 when Anthony Mairone was an active member of the Philadelphia Police Department. The witnesses presented by the government were witnesses who testified for the goverment after they were granted immunity (the "vice operators"), and a convicted police officer who testified after having his sentence of imprisonment, which he was serving, reduced to time served. The only defense offered by Anthony Mairone was the evidence of his good character and reputation. This evidence was offered to show that Anthony Mairone's character and reputation was inconsistent with those traits of character ordinarily involved in the commission of the crime of extortion. The evidence was offered in the hope that the jury may think it improbable that a person, such as Anthony Mairone whose character and reputation evidence was unchallenged, would commit the crimes charged and therefore find him not guilty. The character evidence was the only evidence introduced by the defense on behalf of Anthony Mairone.

A request for a specific instruction was submitted to the trial court. The instruction specifically requested from the court was:

> "Evidence of good reputation in and of itself can create a reasonable doubt."

The trial court refused to instruct the jury as requested stating "that instruction is not the law today".

The trial court instead instructed the jury on character evidence as follows:

> "Now, you did hear some, some people call it character evidence, reputation evidence.
>
> You heard a number of character witnesses, each of whom, some of whom, let's put it that way, I think, stated their personal opinion, as well as the reputation of the defendant in the community for honesty and being a law abiding citizen and the law says, you should consider such character evidence along with all the other evidence you heard in the case when making your determination as to whether the government has proved, beyond a reasonable doubt, that the defendant whose case you are then considering, committed the particular crime or crimes that are alleged in the indictment."

After the court completed its charge to the jury and before the jury was released to deliberate, an objection was taken to the charge on Character Evidence and the court was asked to charge the jury as previously requested. The court denied the objection and granted defense counsel an exception. The United States Court of Appeals for the Third Circuit affirmed the action of the District Court.

REASONS FOR GRANTING THE WRIT

In the instant case, the petitioner Anthony Mairone offered as his only defense, character and reputation evidence. Anthony Mairone, through his trial attorney, requested the court to charge the jury as follows: "Evidence of good reputation in and of itself can create a reasonable doubt".

The trial court instead instructed the jury on character evidence using its own wording, but did not at any time instruct

the jury that evidence of good reputation in and of itself could create a reasonable doubt.

Evidence of good reputation in and of itself can create a reasonable doubt; this is a correct proposition of law according to the United States Supreme Court "in a proper case". Federal courts have a duty to follow the mandate of the United States Supreme Court.

The United States Supreme Court in *Michelson v. United States,* 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948), a case which reviewed the uniqueness of character evidence and in which both the majority and dissent agreed that its beneficial nature to a defendant was unquestionable, said:

> "Character is relevant in resolving probabilities of guilt. He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant *for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt.*" (Emphasis added.)

The United States Supreme Court then stated unequivocally:

> "And that in the federal courts a jury in a proper case should be so instructed." *Michelson v. United States,* 335 U.S. at page 476, 93 L. Ed. at p. 174.

The petitioner contends that his case was certainly "a proper case" for the charge he requested. He was a former police officer who had an excellent reputation. The witnesses presented by the

government were "vice operators" who testified after they were given immunity by the government and a convicted former police officer who had his sentence reduced as a result of his cooperation with the government. The only evidence offered on behalf of the petitioner was his excellent reputation through "character testimony". The Supreme Court has held "that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt". *See Michelson v. United States (supra).* This is the charge that was requested of the court which the court refused to charge. Under the circumstances of this case, the instruction as requested should have been given. A request for a charge that correctly enunciates the principles upon which the jury should consider character evidence imposes a duty upon the trial court to instruct on those principles. In *Edgington v. United States,* 164 U.S. 361, 366, 17 S. Ct. 72-73, 41 L. Ed. 467, the Supreme Court stated:

> "the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. *The circumstances may be such that an established reputation for good character,* if it is relevant to the issue, *would alone create a reasonable doubt* although, without it, the other evidence would be convincing." (Emphasis added.)

The Supreme Court of the United States stated in the case of *Bird v. United States,* 180 U.S. 356, 45 L. Ed. 356 at p. 361:

> "It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal . . . The chief object contemplated in the charge of the judge is to

> explain the law of the case, to point out the essentials to be proved on the one side and the other side, and to bring into view the relations of the particular evidence adduced to the particular issues involved."

Since the District Court refused to charge on a requested instruction, which was a correct proposition of law, the petitioner is entitled to a new trial. The instruction given by the court did not cover the requested charge. The court merely told the jury to consider character evidence along with all the other evidence in the case when making your determination as to whether the government has proven its case beyond a reasonable doubt. The court never instructed the jury that character evidence alone could raise a reasonable doubt of guilt.

The federal District Court failed to instruct on a correct proposition of law which instruction should have been given as per the pronouncement of the United States Supreme Court in *Michelson v. United States,* 335 U.S. 469, 476, 93 L. Ed. 168, 174, 69 S. Ct. 213 (1948). The United States Court of Appeals for the Third Circuit ignored the case of *Michelson, supra,* which language the petitioner contends is mandatory and does not give the trial judge discretion in using his own words unless in some way he indicates the standing alone instruction. The decision of the United States Court of Appeals for the Third Circuit is in conflict with the applicable decisions of this Honorable Court especially *Michelson v. United States,* 335 U.S. at page 476, 93 L. Ed at p. 174 and a writ of certiorari should issue to review this decision.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

STEPHEN P. GALLAGHER
STACK & GALLAGHER, P.C.
Attorneys for Petitioner

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED FEBRUARY 25, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1467

UNITED STATES

v.

ANTHONY MAIRONE,

Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, AND COWEN, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Appendix A

s/ John J. Gibbons
Chief Judge

Dated: February 25, 1988

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS DATED JANUARY 29, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-1452 and 87-1467

UNITED STATES OF AMERICA

v.

SPANGLER, EDWARD
Appellant in No. 87-1452

MAIRONE, ANTHONY
Appellant in No. 87-1467

On Appeal from the United States District
Court For the Eastern District
of Pennsylvania
(Criminal No. 87-54)

Submitted Under Third Circuit Rule 12(6)
January 19, 1988
Before: GIBBONS, *Chief Judge*,
WEIS and GREENBERG, *Circuit Judges*

(Filed January 29, 1988)

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OPINION OF THE COURT

GIBBONS, *Chief Judge*:

Edward Spangler, a Philadelphia Police Lieutenant, and Anthony Mairone, a police officer, both employed during the relevant time period as members of the East Division vice squad, appeal from judgments of sentence imposed following their conviction by a jury of extortion, conspiracy to commit extortion, and aiding and abetting the crime of extortion. 18 U.S.C. § 1951 (1982); 18 U.S.C. § 2. Each contends that the trial court erred in failing to give a requested instruction on evidence of his good character, and in choosing the wording of the instruction on good character which was given.

Appendix B

The government's case consisted of the testimony of Andy Kelly, a police officer who worked as Mairone's partner in the vice squad, and the testimony of approximately 10 numbers writers and one sports betting operator. From that testimony the jury could reasonably conclude that the numbers operators and the sports betting operator regularly made protection payments to Kelly or Mairone, and that these payments were divided among Spangler, Kelly, and Mairone.

Spangler testified on his own behalf. Mairone elected not to testify. Each presented various witnesses who testified to his character or reputation as a good, honest, law-abiding citizen. Both defendants requested a specific instruction:

> Evidence of good reputation in and of itself can create a reasonable doubt.

The trial court indicated that it would include in the jury charge "the character witness instruction," but did not specifically agree to charge in the precise language which was requested. The court instructed on character evidence as follows:

> Now, you did hear some, some people call it character evidence, reputation evidence.
>
> You heard a number of character witnesses, each of whom, some of whom, lets put it that way, I think, stated their personal opinion, as well as the reputation of the defendant in the community for honesty and being a law abiding citizen and the law says, you should consider such character evidence along with all the other evidence you heard in the case when making your determination as to whether the government has proved, beyond a reasonable doubt, that the defendant whose case you are then considering, committed the particular crime or crimes that are alleged in the indictment.

Relying particularly on *United States v. Logan*, 717 F.2d 84 (3d Cir. 1983) Spangler and Mairone contend that the failure to at least include in the instruction the requested language that evidence of good reputation in and of itself can create a reasonable doubt, was an error which requires a new trial. In *Logan*, the opinion reviewed this court's caselaw on the character evidence instruction. That caselaw starts with a pronouncement in *Kaufmann v. United States*, 282 F. 776, 785 (3d Cir.), *cert. denied*, 260 U.S. 735 (1922), that "the defendant was not entitled to have the judge charge that his good reputation, standing alone, of itself, without regard to the other evidence or circumstances in this case, was sufficient to create reasonable doubt." Two decades later, in *United States v. Quick*, 128 F.2d 832, 835 (3d Cir. 1942) the Court stated that jurors should be instructed:

> . . . that they should consider the character evidence along with all of the other evidence in the case and that, when all of the evidence has been considered, if a reasonable doubt as to the defendant's guilt then existed, it was their duty to acquit. . . .

See also United States v. Klass, 166 F.2d 373 (3d Cir. 1948)(in banc); *United States v. Frischling*, 160 F.2d 370 (3d Cir. 1947). None of these cases required that the district court give, when requested, a "standing alone" charge such as the one *Kaufmann* said it might properly reject.

In *United States v. Baysek*, 212 F.2d 446, 447-48 (3d Cir.), *cert. denied*, 348 U.S. 836 (1954), the district judge charged the jury that character evidence "of itself" or "alone" may raise a reasonable doubt but then stated, "If, however, you are satisfied the Defendant is guilty, you should convict him, notwithstanding proof of good character." In affirming the conviction, Judge

Maris explained that this last sentence did not undo the "very full and fair statement of the duty of the jury to consider the character evidence with the other evidence in the case and to acquit the defendant if the character evidence, either alone or considered with other evidence, raised a reasonable doubt of his guilt". 212 F.2d at 448. While the *Baysek* decision approved a "standing alone" charge, it certainly did not require one. *But see Logan*, 717 F.2d at 90 n.11 (quoting Judge Maris' description of the district court's charge as a holding that such a charge is required) (dictum). Instead, "all that was required" was that the jury "must have understood that if after consideration of all the evidence, including the character evidence, they were satisfied beyond a reasonable doubt of the defendant's guilt they should convict him even though he offered evidence of good character." 212 F.2d at 448.

The *Logan* holding is consistent with these earlier decisions. The court ordered a new trial in *Logan* because of the total omission of a character evidence instruction. Thus the holding is of no help to Spangler and Mairone. They rely instead on dicta in *Logan* recommending a character evidence instruction suggested in Devitt & Blackmar, *Federal Jury Practice and Instructions* § 15.25 (3d ed. 1977); 717 F.2d at 92. The suggested instruction was not the "standing alone" charge which Spangler and Mairone requested. A simplified version now appears in the 1987 Cumulative Supplement of Devitt and Blackmar, *Federal Jury Practice and Instructions* § 15.25. That simplified version provides in full:

> You have heard testimony that the defendant, _____, (has a good reputation for [e.g., honesty] in the community where he lives and works) (in his opinion, is an [honest] person). Along with all the other evidence you have heard, you may take into

> consideration what you believe about the defendant's [honesty] when you decide whether the government has proved, beyond a reasonable doubt, that the defendant committed the crime.

The commentary notes that "[l]anguage suggesting that character evidence alone can create a reasonable doubt was disapproved in United States v. Burke, 781 F.2d 1234 (7th Cir. 1985), citing cases from several circuits."

We hold that so long as an instruction consistent with *Quick*, *Frischling* and *Baysek* is given, which calls the jury's attention to its duty to take character evidence into account with all of the other evidence in deciding whether the government has proved its charge beyond a reasonable doubt, the omission of the express "standing alone" language which was requested here is not an abuse of the discretion vested in the trial court to choose the wording of the character evidence charge. The court's instruction satisfied the *Quick*, *Frischling*, *Baysek* standard. Thus the defendants' new trial motions were properly denied.

Spangler urges, however, that a new trial should be granted because the court promised a "standing alone" charge and thereby misled his attorney with respect to appropriate closing argument. We find no such promise in the record. Even if the record supported the contention the outcome would be no different, for there is no significant difference between counsel's argument and the court's instruction. Obviously counsel was free to place greater emphasis on the significance of the character evidence than did the trial judge.

Mairone contends that he received ineffective assistance of counsel because his attorney failed to request a more specific character evidence instruction. We do not ordinarily consider an ineffective assistance of counsel contention on direct appeal. *United States*

v. Sturm, 671 F.2d 749 (3d Cir.) *cert. denied*, 459 U.S. 842 (1982). We note, however, that a collateral attack on the judgment of sentence in Mairone's case can hardly succeed with respect to the character evidence instruction in light of our holding that the instruction satisfied the caselaw governing in this circuit.

The judgments appealed from will, therefore, be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JULY 28, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 87-54-01, 02

FILED JULY 28, 1987

UNITED STATES OF AMERICA

v.

EDWARD SPANGLER
ANTHONY MAIRONE

MEMORANDUM AND ORDER

BRODERICK, J. JULY 28, 1987

Defendants Anthony Mairone and Edward Spangler were found guilty by a jury on all counts of a sixteen-count indictment charging them with conspiracy to commit extortion and extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and aiding and abetting the crime of extortion in violation of 18 U.S.C. § 2. In their defense, the defendants attempted to demonstrate that the government could not prove its case because the bulk of the evidence was testimony of convicted criminals whose testimony was not credible and because the defendants had good reputations in the community.

Mairone has filed a motion for a new trial pursuant to Fed. R.Crim.P. 33. Spangler has filed a motion for judgment of

acquittal pursuant to Fed.R.Crim.P. 29, or in the alternative, for a new trial pursuant to Rule 33. For the reasons that follow, the defendants' motions will be denied.

I. Defendants' Motions for New Trial

Both defendants assert that this Court erred in failing to accept the defendants' requested point for charge with respect to character evidence. The defendants' requested charge reads as follows:

> Evidence of good reputation in and of itself can create a reasonable doubt.

The Court instead gave the following instruction in connection with character evidence:

> Now, you did hear some, some people call it character evidence, others reputation evidence. You heard a number of character witnesses, each of whom, some of whom, let's put it that way, I think stated their personal opinion as well as the reputation of the defendant in the community for honesty and being a law abiding citizen and the law says you should consider such character evidence, along with all the other evidence you heard in the case, when making your determination as to whether the government has proved beyond a reasonable doubt that the defendant whose case you are then considering committed the particular crime or crimes that are alleged in the indictment.

See Devitt and Blackmar, *Federal Jury Practice and Instructions,* §15.25 (1986 Cumulative Supp. to 3d ed. 1977) adapted from

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Pattern Criminal Jury Instructions, Federal Judicial Center (1982) No. 51.

The charge requested in this case can be characterized as a "standing alone" charge. In June 1982, in *Pattern Criminal Jury Instructions* No. 51, the suggested charge of defendant's good character included a concluding sentence which states:

> Evidence of the defendant's [honesty] alone may create a reasonable doubt whether the government proved that the defendant committed the crime.

In the commentary, however, it is stated:

> It is not clear that the final sentence is legally required but the committee felt such a reference was appropriate.

Since 1982, however, language suggesting that character evidence alone can create a reasonable doubt was disapproved in *United States v. Burke,* 781 F.2d 1234, 1241-42 & n.3 (7th Cir. 1985) (citing cases from the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits). In this Circuit, *United States v. Logan,* 717 F.2d 84 (3d Cir. 1983), makes it clear that the denial of a request for a "standing alone" charge as to good character is not error. The *Logan* court recommended that district courts use the charge on character evidence suggested in Devitt and Blackmar, *Federal Jury Practice and Instructions,* §15.25 (3d ed. 1977). This Court notes, however, that that charge has been revised by Devitt and Blackmar in the 1986 Cumulative Supplement eliminating the "standing alone" language in the 1977 third edition as well as eliminating the "standing alone" language contained in the last sentence of the *Pattern Criminal Jury Instruction* No. 51.

Appendix C

II. Spangler's Motion for New Trial

Defendant Spangler contends that he is entitled to judgment of acquittal or a new trial on the ground that his request for a severance during the prosecution's case-in-chief was improperly denied. Spangler contends that his trial should have been severed from co-defendant Mairone's because of allegedly prejudicial testimony which was brought out by Mairone's counsel on cross-examination and by the Assistant United States Attorney on redirect examination of the prosecution's key witness, Andy Kelly. For the reasons that follow, Spangler's motion for acquittal or for a new trial will be denied.

A request for severance is addressed to the sound discretion of the trial court. *United States v. Dansker,* 537 F.2d 40, 61 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977). The trial court is in the best position to weigh the possible prejudice to the defendant, particularly when a severance motion is made as a result of trial testimony. *United States v. Frankenberry,* 696 F.2d 239, 243 (3d Cir. 1982). The trial court should balance the actual prejudice to the defendant against the desirability of joint trials, particularly those involving a conspiracy count. *United States v. Segal,* 534 F.2d 578, 583 (3d Cir. 1976). The court may deny severance in the absence of a clear showing that the defendant will be so severely prejudiced by continuing with a joint trial that it will in effect deny him a fair trial. *United States v. Frumento,* 405 F. Supp. 23, 31 (E.D.Pa. 1975) (citation omitted). *See United States v. Wright-Barker,* 784 F.2d 161, 175 (3d Cir. 1986) (to show abuse of discretion in denying severance, defendant "must demonstrate clear and substantial prejudice resulting in a manifestly unfair trial") (citing *United States v. DeLarosa,* 450 F.2d 1057, 1065 (3d Cir. 1971), *cert. denied,* 405 U.S. 927 (1972)). As the Third Circuit has stated:

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> A defendant is not entitled to a severance merely because the evidence against a co-defendant is more damaging than that against him. If that were the case, a joint trial could rarely be held. Rather, in determining whether disparate proofs require a severance, the proper inquiry is whether the evidence is such that the jury cannot be expected to "compartmentalize" it and then consider it for its proper purposes.

United States v. Dansker, 537 F.2d at 62 (citation omitted). The court may grant a severance when a defendant can demonstrate that the jury could not reasonably be expected to "compartmentalize" the evidence as it relates to the defendant and that the failure to sever clearly and substantially prejudices the defendant to the point of depriving him of a fair trial. *United States v. Dickens*, 695 F.2d 765, 778 (3d Cir. 1982) (citing *United States v. DeLarosa*, 450 F.2d 1057 (3d Cir. 1971); *United States v. Reicherter*, 647 F.2d 397 (3d Cir. 1981)).

Spangler asserts that prejudicial testimony by Kelly, brought out during cross-examination by Mairone's counsel and on redirect by the government, provides grounds for severance and a mistrial, and that the Court's denial of those motions during trial was an abuse of discretion. We disagree.

The only additional evidence claimed by Spangler to be prejudicial, brought out by counsel for Mairone on his cross-examination of Kelly and by the government on redirect examination of Kelly, was that Kelly had stated to the FBI that he estimated that Spangler had received about $1500 per month in extortion money. This additional testimony did not so clearly and substantially prejudice Spangler such that he did not receive

a fair trial. Kelly had already testified on direct that he personally turned over to Spangler all the extortion money and that Spangler was the one who divided it up among certain police officers at the East Police Division.

There is no basis to argue that Kelly's testimony elicited on cross-examination by Mairone's counsel and on redirect by the government was grounds for severance. Furthermore, this Court had ruled that since counsel for Mairone had attempted to impeach Kelly's testimony on the basis of statements made by Kelly to the FBI, the government had the right on redirect examination to question Kelly regarding those parts of Kelly's statement which showed that his testimony on cross-examination was consistent with his testimony on direct examination. When this Court made its ruling, it quoted from Weinstein's Evidence, ¶613[04] at 613-22 as follows:

> The impeached witness is given the right by Rule 613 to explain his inconsistent statement. The compass of this right is that he may "relat[e] whatever circumstances would naturally remove" the effect of the supposed inconsistency. A witness may, for instance, explain that his prior statements were compelled by fear, that he was misunderstood, or that his statements only appeared to be inconsistent because they were taken out of context. "Counsel [may] not utilize a single statement from the writing and foreclose the opposition from entering however much of the context is necessary to explain an apparent self-contradiction by the witness." See Rule 106.

Appendix C

III. Spangler's Motion for Judgment of Acquittal

Spangler also asserts that he is entitled to a judgment of acquittal on the ground that the verdict is "against the weight of the evidence." Spangler does not direct the Court's attention to any testimony or other evidence in support of his contention. On a motion for judgment of acquittal, the relevant inquiry is as follows: Viewing the evidence in the light most favorable to the government and drawing all reasonable inferences therefrom in the government's favor, can it be said that *no* rational jury could conclude beyond a reasonable doubt that the defendants committed the offenses with which they were charged? *See United States v. Ashfield,* 735 F.2d 101, 106 (3d Cir. 1984) (citing *Glasser v. United States,* 315 U.S. 60, 80, 62 S. Ct. 457, 469 (1942); *United States v. Jannotti,* 673 F.2d 578, 598 (3d Cir. 1982), *cert. denied,* 457 U.S. 1106 (1982)). The Court finds that the evidence produced at trial, viewed in the light most favorable to the government, was more than sufficient to support the verdict.

The evidence presented at trial can be summarized as follows: At all times relevant to the indictment, Spangler was a Philadelphia police officer, with the rank of lieutenant, assigned to the Tow Garage and then to the vice squad of the East Police Division in a supervisory capacity. From about July 1980 through about May 1983, Spangler knowingly and unlawfully agreed with Anthony Mairone and Andy Kelly to commit extortion. Such extortion took the form of obtaining protection money from vice operators, such as illegal gamblers and video poker machine venders. Spangler was the lieutenant at the vice squad in the East Police Division and was the person to whom Kelly and Mairone turned over their collections of protection money which amounted to about $6000 per month. The testimony was convincing that this money was then distributed to the members of the vice squad

in the East Police Division including an inspector who was Spangler's superior officer. The government produced a substantial amount of testimonial and documentary evidence revealing Spangler's participation in the extortion operation in the East Police Division. The evidence revealed an extensive operation involving collection of protection money for over fifteen vice operators in the East Police Division. The evidence demonstrated that the vice operators who paid protection money were permitted to continue their illegal activities without interference from the vice squad of the East Police Division. The strength of the government's case leaves no doubt that the evidence was more than sufficient to support the jury's verdict on each count. Spangler's contention that the evidence produced at trial was insufficient to support the jury's verdict is therefore rejected.

For all of the foregoing reasons, therefore, the defendants' motions will be denied.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 87-54-2

UNITED STATES OF AMERICA

v.

ANTHONY MAIRONE

ORDER

AND NOW, this 28th day of July, 1987, upon consideration of defendant Mairone's motion for a new trial, for the reasons set forth in this Court's Memorandum of July 28, 1987,

IT IS ORDERED: Defendant Mairone's motion for a new trial is DENIED.

s/ Raymond J. Broderick
RAYMOND J. BRODERICK, J.